STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MUNICIPAL BOND INVESTORS ASSURANCE CORPORATION	:	DETERMINATION DTA NO. 811060
for Redetermination of a Deficiency or for Refund of Franchise Tax on Insurance Corporations under Article 33 of the Tax Law for the Years 1987 and 1988.	:	

Petitioner, Municipal Bond Investors Assurance Corporation, 113 King Street, Armonk, New York 10504, filed a petition for redetermination of a deficiency or for refund of franchise tax on insurance corporations under Article 33 of the Tax Law for the years 1987 and 1988.

On February 12, 1993 and February 17, 1993, respectively, petitioner through its corporate secretary, Louis G. Lenzi, and the Division of Taxation by William F. Collins, Esq. (John O. Michaelson, Esq., of counsel), signed a waiver of hearing and consented to have the matter determined based upon submitted documents and briefs. On March 8, 1993, the Division of Taxation submitted its exhibits. On March 30, 1993, petitioner submitted its brief and exhibits. The Division of Taxation filed its responding brief on June 30, 1993, and petitioner submitted a reply brief on July 30, 1993. After due consideration of the evidence and briefs filed herein, Carroll R. Jenkins, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to a retaliatory tax credit pursuant to Tax Law §§ 1505-a(d)(2) and 1511(c), for Metropolitan Transportation Business Tax Surcharge payments ("the tax surcharge") made to California,Kansas, Pennsylvania and Connecticut (hereinafter sometimes referred to as "the sister states" or "the taxing states").

FINDINGS OF FACT

On May 24, 1991, the Division of Taxation ("Division") issued to petitioner, Municipal Bond Investors Assurance Corporation, a Statement of Audit Adjustment and corresponding Notice of Deficiency asserting the tax surcharge in the amount of $67,128.00, plus interest, for calendar year 1987. Under the heading "Explanation", this Statement of Audit Adjustment stated:

"Refund of 9/14/89 $32,892.00
Refund of 6/20/90 $34,236.00
Total Amount Due $67,128.00"

On the same day, the Division issued to petitioner a second Statement of Audit Adjustment and corresponding Notice of Deficiency asserting the tax surcharge in the amount of $7,276.00 plus interest, for calendar year 1988. This second Statement of Audit Adjustment stated under the heading "Explanation" that:

> "Section 1505a(d)(2) [sic] allows a domestic insurance corporation a credit only for retaliatory taxes it pays which it is legally obligated to pay. The credit is not allowable for retaliatory taxes which a domestic insurance company may pay or self-assess which are not legally due to another state.
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> "Since California, Pennsylvania, Connecticut and Kansas statues [sic] do not clearly and unambiguously retaliate against the Metropolitan Transportation Surcharge, Municipal Bond Investors Assurance Corp was not legally obligated to pay such retaliatory tax. Therefore the refunds previously issued were erroneous and additional MTA Surcharge is due."

The tax asserted by the above notices of deficiency represents amounts which the Division had originally refunded to petitioner as retaliatory tax credits under Tax Law Article 33 for the years 1987 and 1988. After first allowing the refunds, the Division determined that the refunds should not have been granted. The subject notices were issued in an attempt to recapture the amounts refunded.

Petitioner was advised in writing by public officials of each of the foreign states that pursuant to the laws of those states, the Metropolitan Transportation Business Tax Surcharge was subject to retaliatory tax, since insurers domiciled in those states with offices in the Metropolitan Commuter Transportation District,[1] would be required to pay the tax surcharge.

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[1]The Metropolitan Commuter Transportation District embraces the City of New York and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester (Public

SUMMARY OF THE PARTIES' POSITIONS

Petitioner maintains that it was required by the laws of California, Pennsylvania, Kansas and Connecticut, and/or by the public officials of those states to pay the tax surcharge, and is entitled to the retaliatory tax credit pursuant to Tax Law §§ 1505-a(d)(2) and 1511(c).

The Division argues that petitioner is not entitled to this credit, because: 1) the payments to the taxing states were not "required payments" under the laws of those states; 2) the Metropolitan Business Tax Surcharge is a regional tax, not a state tax, and is therefore not subject to the credit; 3) petitioner's payments to the foreign state must be specifically for the privilege of being in the insurance business; and 4) petitioner is not entitled to the retaliatory tax credit in the absence of first challenging the imposition of the surcharge in the taxing states. The Division believes that petitioner could be denied the subject tax credit for any one of these reasons.

CONCLUSIONS OF LAW

A. Tax Law § 1505-a imposes the Temporary Metropolitan Transportation Business Tax Surcharge on insurance corporations for the privilege of doing business in the metropolitan commuter transportation district. Tax Law § 1505-a(d)(2) provides a credit (sometimes referred to as "retaliatory tax credit") to be applied against the tax surcharge imposed by this section, as follows:

> "If, by the laws of any state other than this state, or by the action of any public official of such other state, any insurer organized or domiciled in this state . . ., subject to the business tax surcharge imposed by this section shall be required to pay taxes for the privilege of doing business in such other state which taxes are imposed or assessed because of the taxes imposed or assessed under this section, in computing the tax imposed by this section a credit shall be allowed for taxes paid to other states . . . ."

Tax Law § 1511(c) makes similar provision for credits against taxes arising under Article 33 and states:

"If, by the laws of any state other than this state, or by the action of any public

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Authorities Law § 1262).

> official of such other state, any insurer organized or domiciled in this state . . .shall be required to pay taxes for the privilege of doing business in such other state and such amounts are imposed or assessed because the taxes which are or would be imposed under this chapter and the insurance law upon insurers organized or domiciled in such other state are greater than those required of insurers organized or domiciled in this state by the laws of such other state for the privilege of doing business therein, then and in every such case, to the extent such amounts are legally due to such other states, an insurer organized or domiciled in this state may claim a credit . . . against the tax payable pursuant to this article of a sum not to exceed ninety percent of such amount . . . ."

B. New York's Insurance Law § 1112 makes provision for the retaliatory taxation of insurers domiciled in other states and doing business in this State. The retaliatory tax of this section is separate from the taxes imposed under the Tax Law and specifically and exclusively applies to insurers domiciled or organized in other states or countries ("foreign insurers"). This tax is imposed on foreign insurers doing business in this State to the same extent, and in the same amount, as their domiciliary State imposes onerous taxes, fees, etc., upon New York State insurers doing business there. The purpose of the tax is to allow both domestic and foreign insurers to compete on an equal basis.

Tax Law § 1511(b) authorizes a credit for taxes paid pursuant to Tax Law Article 33 against the retaliatory taxes imposed by Insurance Law § 1112. However, the Superintendent of Insurance has construed section 1112 as meaning that a credit is only available against the retaliatory tax of this section when the tax, fee etc., paid by a foreign insurer is for the privilege of being in the insurance business in New York. This interpretation of section 1112 was sustained by the Court of Appeals in Matter of Industrial Indemnity Company v. Cooper (81 NY2d 50, 595 NYS2d 726 [1993]). In that case, the Court held that a foreign insurer's payments for commercial rent and occupancy tax ("commercial rent tax") to New York City did not qualify for the credit, because it was not a payment for the privilege of engaging in the insurance business.

C. The Administrative Law Judge takes official notice of the statutes of Kansas, Connecticut, and Pennsylvania and provisions of the Constitution of the State of California cited, infra, which relate, in each instance, to taxation of insurance companies.

D. Article XIII, Section 28, Subsection f(3) of the Constitution for the State of California

states, in pertinent part, that:

> "When by or pursuant to the laws of any other state or foreign country any taxes, licenses and other fees . . . are or would be imposed upon California insurers . . . which are in excess of such taxes, licenses and other fees . . . directly imposed upon similar insurers . . . of such other state or country under the statutes of this state . . . the same taxes, licenses and other fees . . . shall be imposed upon the insurers . . . of such other state or country doing business or seeking to do business in California . . . . Any tax, license or other fee or other obligation imposed by any city, county, or other political subdivision or agency of such other state . . . on California insurers . . . shall be deemed to be imposed by such state . . . ."

The statutes of Pennsylvania (Pa Stat Ann tit 40, § 50), Kansas (Kan Stat Ann § 40-253), and Connecticut (Conn Gen Stat § 12-211) each contain similar retaliatory provisions.

E. The Division, relying on the decision of the Court of Appeals in Matter of Industrial Indemnity Company v. Cooper (supra), argues that petitioner is not entitled to the retaliatory tax credit of Tax Law §§ 1505-a(d)(2) and 1511(c), because the tax surcharges paid to the taxing states were not required by the laws of those states. The Division's reliance on Industrial Indemnity is misplaced, since that case is distinguishable from the facts here.

In Industrial Indemnity, the Court of Appeals construed the retaliatory tax provisions of Insurance Law § 1112 as it applied to a foreign insurer. The Court held that the foreign insurer was not entitled to take a credit against the retaliatory tax imposed by Insurance Law § 1112 for New York City's commercial rent tax , because the commercial rent tax is not imposed on an insurer for the privilege of engaging in the insurance business. Unlike Industrial Indemnity, the instant matter involves the application of the retaliatory tax provisions of the sister states noted above, and the taxes imposed and credits authorized by Tax Law Article 33 as they relate to this domestic insurer. Insurance Law § 1112 need not be considered here, because it relates only to foreign insurers.

F. While the Superintendent of Insurance is entitled to deference in his interpretation of provisions of Insurance Law § 1112 (Matter of Industrial Indemnity Company v. Cooper, supra), the relevant tax credits in this case do not arise under the Insurance Law, but under under Tax Law §§ 1505-a(d)(2) and 1511(c).

Under these provisions, to obtain a credit against the metropolitan transportation business

tax surcharge payments made to the taxing states and imposed by Tax Law § 1505-a, petitioner need not show that the taxes paid to the sisters states were for the privilege of being in the insurance business. By the express terms of Tax Law §§ 1505-a(d)(2) and 1511(c), petitioner only needs to show: 1) that the tax was required by the laws of another state or by the acts of a public official of such other state; and 2) that such payments were required for the privilege of doing business in such other state.

G. Petitioner has shown by clear and convincing evidence that the laws of California, Kansas, Pennsylvania and Connecticut each have retaliatory tax provisions and that the laws of those states required, for the privilege of doing business there, that petitioner pay to those states the Metropolitan Transportation Business Tax Surcharge. Further, petitioner has also shown by clear and convincing evidence that public officials of each of those states have acted to require it to pay the tax surcharge to those states for the privilege of doing business there.

H. The Division's argument that the tax surcharge is a regional or municipal tax is not persuasive. The tax was authorized by an Act of the New York State Legislature (L 1983, ch 11, § 13), is codified in the Tax Law of the State, is collected by the Commissioner of the Department of Taxation and Finance, a State agency. This is clearly not a local or municipal tax, but even if it were, the Division's argument would not be strengthened (cf., Matter of John Hancock Mutual Life Ins. Co. of Boston, Mass. v. Pink, 276 NY 421, 12 NE2d 529 [1929]). This is particularly so, since by the express terms of both Tax Law §§ 1105-a(d)(2) and 1115(c), the actions of the public officials of the taxing states in requiring petitioner to pay the tax surcharge would be sufficient independent grounds for it to claim and to receive the retaliatory tax credit.

I. The Division offered no legal authority for its argument that petitioner is not entitled to claim the retaliatory tax credits of Tax Law §§ 1505-a(d)(2) and 1511(c), until it has first contested the imposition of the surcharge in the sister states. No legal authority for imposing such a requirement was cited by the Division, nor could such authority be found in the statute.

J. The petition of Municipal Bond Investors Assurance Corporation is granted and the notices of deficiency are cancelled.

DATED: Troy, New York
September 30, 1993

/s/ Carroll R. Jenkins
ADMINISTRATIVE LAW JUDGE